Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 725

GEORGE STEVENSON, a minor by his next friend, Mrs. Mattie Stevenson; LARRY D. HARVEY, a minor, by his next friend, J. W. Harvey, Jr.; AVERY W. HARVEY, JR., by his next friend, A. W. Harvey on behalf of themselves and all others similarly situated,

Petitioners,

versus

THE BOARD OF EDUCATION OF WHEELER COUNTY, GEORGIA, and ASHLEY CLARKE, W. J. MITCHELL, L. B. CHAMBERS, A. B. CLARK, CLADY COX, V. L. NEWTON individually and in their official capacities as members of the Board of Education of Wheeler County, Georgia; WILLIAM S. CLARK, individually and in his official capacity as Superintendent of Schools of Wheeler County; Perry Doak, individually and in his official capacity as Principal of Wheeler County High School,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, George Stevenson, et al. pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on May 26, 1970, with rehearing request denied June 23, 1970.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. 16-22. The order denying rehearing, as yet unreported, appears at Appendix B, infra, pp. 23-24. The opinion of the United States District Court for the Southern District of Georgia, 306 F. Supp. 97, appears at Appendix C, infra, pp. 24-35. The District Court's denial of petitioners' request for injunctive relief was affirmed by the Court of Appeals for the Fifth Circuit.

Jurisdiction

The order and judgment of the Court of Appeals (Appendix A, infra pp. 16-22) was entered on May 26, 1970. A timely petition for rehearing was denied on June 23, 1970 (Appendix B, infra, pp. 23-24). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition for certiorari was filed less than 90 days from the date aforesaid.

Questions Presented

1. Whether the Wheeler County Georgia School Board's regulation requiring male students to shave denies them freedom of expression as guaranteed by

the First Amendment of the United States Constitution as embodied in the Fourteenth Amendment.

2. Whether the imposition of such a regulation, without regard to the personal appearance of the student, or whether or not he and or his mustache is neat, is an overly broad exercise of the regulatory powers of a school board.

3. Whether or not there is any compelling state interest which would justify a rule requiring all males either to have or to be excluded from attending public school.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment 9:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The Fourteenth Amendment of the Constitution of the United States provides in pertinent part as follows:

> ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Regulation 21 of Wheeler County, Georgia Board of Education, 1969 provides in pertinent part as follows:

> ... All students will be expected to meet the standards of good grooming as set by the faculty and administration and interpreted by the principal or assistant principal of the school. These shall include items such as hair cuts ...

42 U.S.C. §1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

state or territory, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF FACTS

On or about October 20, 1969, each of the petitioners was sent home from school and told not to return until he had shaved. This action was pursuant to a regulation adopted by the Wheeler County Board of Education establishing "good grooming" standards which were to be further defined by the particular school and its officials.

Petitioners did not believe that it was proper exercise of regulatory powers for the school board to dictate to them "shaving" instructions, and suit was commenced by their parents, as next friends. Petitioners' request for injunctive relief allowing them to return to school, until there was a judicial determination of the matter at hand, was refused by Judge Lawrence of the Southern District of Georgia, United States District Court.

At trial, it was shown that petitioners, George Stevenson, Larry D. Harvey, and Avery W. Harvey, three black male high school students, were suspended for refusing to shave small growths of facial hairs, com-

monly referred to as mustaches. School officials deemed facial hairs to be violative of good grooming rules and further decreed these growths to be disruptive to the general environment of academic and student learning. They disclaimed racial motivations in adopting the regulation. The petitioners and their parents, next friends, contended that it was their right, the parents, to regulate the appearance of their children. They further averred that their children were groomed neatly, in their opinion, and they were "not ready" to shave. A final contention was that the petitioners were entitled to symbolically assert their manhood. Granting that whites had been treated likewise, petitioners contended that such action is peculiarly repugnant to black youths, who now are aware of their history in America, and, that of their ancestors, who, as slaves, were virtually dehumanized and their manhood emasculated. They aver that black men, as slaves, were required to shave and to have no hair on their faces. This, they resent deeply and openly display a desire to promulgate a change in the presentation commonly reserved for black men, realizing that the black student of today is the black man of tomorrow. There is no desire to wait until tomorrow, as immediate change must be had for the common betterment of tomorrow. They believe that it is necessary for them to show and express their manhood in as many ways as possible.

On November 17, 1969, Chief Judge Lawrence denied petitioners' request that the school board be enjoined from enforcing the said regulation. Calling the suit "a lilliput of a lawsuit — a legal controversy that has

upset everybody in the school system — a cause celebre. . . ." Judge Lawrence, following the suggestions of the defendants, characterized the case as a threat to the desegregation plans recently effected in Wheeler County. He discerned no racial overtones in the adoption of the policy and concluded that even though no incidents or commotions had resulted therefrom, *they might arise*. Judge Lawrence concluded that the schools should decide the manner in which students deport themselves, not the court.

Following a summary denial of an application for relief pending appeal (December 19, 1969), the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, pp. 18-22) upheld the lower court's ruling. Circuit Judge Bell, speaking for the three sitting Judges, noted that the school's faculty considered shaving a part of good grooming. Referring to petitioners' growth of facial hairs, he concluded that it was not unreasonable for the school officials to say that the time had come for them to shave. Timely petition for rehearing was summarily denied (Appendix B, infra, pp. 23-24).

Jurisdiction of the court of first instance. The United States District Court was had under the Fourteenth Amendment of the United States Constitution and Title 28, United States Code §§ 1331 and 1343 (3) (4) and Title 42, United States Code §§ 1981 and 1983.

REASONS FOR GRANTING THE WRIT

"It is precisely every citizen's right to be a 'speckled bird' that our constitutions, state and federal, seek to insure. *Mitchell* v. *McCall*, 273 Ala. 604, 143 S. 2d

629. The decision below directly conflicts with the ideal of freedom of expression and individuality as enunciated by the courts of other circuits and this Court in *Griswold* v. *Connecticut*, 318 U.S. 479.

The First Amendment does not explicitly quote nor attempt to mention each and every individual right, but includes certain peripheral rights. Without these peripheral rights, the specific rights therein would be less secure. *Griswold*, supra p. 483.

Each individual is in possession of certain "zones" of privacy. These "zones" of privacy includes the right of non-disclosure of associational membership and enrollment (*NAACP* v. *Alabama*, 357 U.S. 449); the right to educate one's children in private and parochial schools (*Pierce* v. *Society of Sisters*, 268 U.S. 510); the right to free speech by students enrolled in public schools (*Tinker* v. *Des Moines Community School District*, 393 U.S. 503); the right of not having Bible reading or prayer in the public school (*Abington Township School District* v. *Schempp*, 374 U.S. 203; *Engel* v. *Vitale*, 370 U.S. 421; and, the right not to salute the flag because of religious scruples. (*West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624.)

Petitioners here desire the recognition of the fact that they, as individuals, are privileged to determine their personal appearances and to wear mustaches, as a mode of expression and as a sign of black maturity. We acknowledge no case exactly on point with this one, yet, there are several cases which are close to point. The Seventh Circuit has taken what we consider

to be a completely opposite point of view from the Fifth Circuit. In *Breen* v. *Kahl*, 419 F. 2d. 1034, (7th Cir) cert. denied, 38 L.W. 3478, no. 1274, Judge Kerner notes that "the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom." It is obvious that *Breen* involved a student's refusal to submit to a school regulation that he get a haircut rather than the issue of facial hair. We aver, however, that the same basic principle is involved. The state has a "substantial burden of justification" for the invoking of such a regulation as in this case, and without this justification there is nothing upon which it can base its case. "Substantial Justification," as defined by the Court is:

> ... [A] government regulation [which] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an *important* or *substantial* governmental interest; if the governmental interest is unrelated to the *suppression of free expression;* and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. (emphasis added) *Breen* supra, at 1036 quoting from *United States* v. *O'Brien* 391 U.S. 367.

Speaking exactly to this point, respondents have not shown any reasons for the restrictions placed upon petitioners right, except the arbitrary imposition of what *they* hold, in their personal, socio-economic beliefs, to be the standards of "good grooming." The regulation is discipline for the sake of discipline. The

State, as was pointed out in *Richards v. Thurston*, 304 F. Supp. 449 at 452-453,

> has no rational ground for dictating hair style to a pupil in general high school as to support an official order interfering with his liberty to express in his own way his preference as to whatever hair style comports with his personality and his search for his own identity ..... from different tones comes the best tune.

A student, like any other citizen, has the right not to conform to the every standard of others. In this case, we have a particularly touchy problem in that the three minor petitioners are black. Social and ethnic standards of black people differ from those of whites. The fact that seven out of eight students sent home to shave, by respondents, were black makes this statement creditable. Black males are wearing their hair longer than before, and in a style which helps to express their identity. Black males do not wish to simply look like a white. It is their desire to be themselves and to establish for themselves a new dimension and, possibly, look. No evidence was produced to show their facial hairs disrupted the learning processes of others, nor that any student objected thereto or even noticed. Further, a man ought not be restrained "from doing a lawful act merely because he knows that his doings may cause another to do an unlawful act. ... It is *absurd* to punish a person because his neighbors have no self-control and cannot refrain from violence." *Richards* v. *Thurston*, 304 F. Supp. 449, 454. (Supplemental Opinion Number II) quot-

ing from *Beatty* v. *Gillbanks*, 9 Q.B.D. 308, 314 and Chafee, *Free Speech in the United States* 151-152.

> These boys were not barred from school because of any actions carried out by them which were of themselves a disturbance of the peace. They were barred because it was *anticipated*, by reason of previous experiences, that their fellow students in some instance would do things that would disrupt the serenity or calm of the school. It is these acts that should be prohibited, not the expressions of individuality by the suspended students. *Ferrell* v. *Dallas, Independent School District* 392 F. 2d at 706 (J. Tuttle dissenting).

We place particular importance upon this paragraph. Certainly we have no reason to anticipate that any disruption will follow the presence of students with facial hairs. No evidence to this effect was offered. The issue of freedom of expression, in this case the expression of black awareness is definitely the major thrust of our case.

Several Federal District courts have been of similar opinion in cases involving student rights to wear different hair styles. *Richards* v. *Thurston*, 304 F. Supp. 449 (N.D. Mass.) *Zachary* v. *Brown*, 299 F. Supp. 1360 (N.D. Ala.); *Boyle* v. *Scapple*, ____ F. Supp. ____ (Oregon) 38 Law Week 2614. In *Richards*, plaintiff was suspended from school following his refusal to cut his hair. Chief Judge Wyzanski noted that there was no regulation formally written, as in our case, which set

any hair length maximum. Judge Wyzanski concluded further that no reason was shown for the suspension, "except possibly the *principal's prejudice*, the community *conventions* of the *first half* of the twentieth century, and the *views of some contemporaries*, who may not be a majority of (the city's) population, or of its parents, or of its students." (Emphasis added). *Richards*, Supra, at 451. The court's treatment of hair styles and length throughout the ages is extremely pertinent.

> Samson's locks symbolically signified his virility. Many of the Founding Fathers of this country wore wigs. President Lincoln grew a beard at the suggestion of a juvenile female admirer. Chief Justice Hughes' beard furnished the model for the frieze over the portico of the Supreme Court of the United States proclaiming equal justice under law.... Whether hair styles be regarded as evidence of conformity or of individuality, they are one of the most visible examples of personality. (Emphasis included in opinion) *Richards*, supra.

Frederick Douglass, George Washington Carver, W. E. B. DuBois, Congressman Powell, the Reverend Martin Luther King, Jr. and with deference, Mr. Justice Marshall, are black men who possess or possessed facial hairs and are heroes to the current black youth. We aver that there is no cause for petitioners to be denied the right to wear facial hairs as an expression of an idea which flows deeply through their veins.

We mention here the inherent right of a parent to regulate the general appearance of their off-spring. Petitioners' parents all felt that their children should not shave. The problem involved here is whether or not the school board should serve to replace the parent as parent, or whether society would be better served by allowing the rules and moral standards of a family to be above those of the school board whenever they do not interfere with appropriate functions of the school system. "It is cardinal with us that custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*, 321 U.S. 158, 166. Whenever a regulation is "arbitrary, capricious, and unreasonable", as in the case, the Court should invalidate the regulation for the well being of all. "[The] ideas of" life, liberty and the pursuit of happiness includes a course of "freedom of expressiona nd a wide zone of of "freedom of expression and a wide zone of privacy." *Ferrell* v. *Davis Independent School District*, cert. denied, 393 U.S. 856 (J. Douglas, dissenting.)

It is beyond us the purpose of such a regulation. Merely arbitrary choices of states or their official representatives cannot be enforced against any individual's serious claims of liberty. This is as true of minors as it is of adults. *Richards* v. *Thurston*, 304 F. Supp. 449, 452; *Tinker* v. *Des Moines School District*, 393 U.S. 503. It serves to benefit no man, save the "folkways and mores" of respondents. No harm has been shown by petitioners wearing of facial hairs. We believe that a man, or boy, has an interest in himself

and that his mode of expression should not be voided for the sole purpose of conformity to a capricious restriction which is violative of his personal and family integrity. It would better serve the purpose of all to strike this unwarranted and unconstitutional restriction placed upon petitioners and those similarly situated.

Neither teacher nor student, it should be noted, gives up their constitutional rights to freedom of speech or expression at the "school house gate." *Tinker*, supra, at 506. *Tinker* further holds, at 508, that "it is this sort of hazardous freedom — this kind of openness — that the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. "A student ought not be regarded as a simple recipient of those things which a state may feel warranted to proffer him.

Almost 80 years ago the Court took note of the special position of the right of the individual to the control of his person in language that bears repeating today:

> For as this Court has always recognized no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. *Union Pac. R. Co. v. Botsford*, 141 U.S. 250.

CONCLUSION

The decision below is palpably erroneous. For the reason stated above, the decision of the Court of Appeals for the Fifth Circuit in the instant case raises a question of great importance. We believe that the decision conflicts with that of the Seventh Circuit and misapplies the standard in Ferrell, supra.

Summary reversal is appropriate. In the alternative, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28875

GEORGE STEVENSON, ET AL,
Plaintiffs-Appellants

versus

THE BOARD OF EDUCATION OF
WHEELER COUNTY, GEORGIA, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

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(May 26, 1970)

Before JONES, BELL, and GODBOLD,
Circuit Judges.

BELL, Circuit Judge: This is a civil rights case brought under 42 USCA §§ 1981 and 1983, and 28 USCA, § 1343 (3), by three male Negro high school students who were suspended from school for refusing to shave. The school authorities deemed them to have been in

violation of good grooming rule. The proof disclosed that the rule was applied to all students alike, white and Negro. Two and only two issues are presented. First, whether the school board could constitutionally maintain a good grooming rule for its students which, as a part thereof, required that male students shave. Second, if so, whether the rule was unconstitutionally applied to the three students in question.

The case is such that the district court felt somewhat put-upon by having to fit a controversy over shaving into an inordinately busy schedule. It was viewed as a problem for school administrators. We share this view. The entire problem seems minuscule in light of other matters involving the school system. The district court had just required the conversion of the Wheeler County school system from a dual to a unitary system. Beginning in September 1969, the particular school attended by the three students here was converted from a predominantly white school into a school with a student body having a racial ratio of 50-50 and a faculty consisting of 15 white teachers and 8 Negro teachers.

The district court, after a full hearing, and as part of a comprehensive opinion, concluded that the good grooming rule which had been promulgated by the board of education was reasonable and that it was also reasonable to include a shaving requirement as a part of it if, as was the case, the faculty determined that such a requirement contributed to the educational environment. *Stevenson v. Wheeler County Board of Education*, S.D. Ga., 1969, 306 F.Supp. 97. The faculty

adopted this requirement at a meeting prior to the beginning of school and all students, including the three here involved, were notified of the requirement.

At the outset, it is important to state that this case does not involve the right to wear a mustache: it is limited by its facts to three young men who, having entered puberty, have determined that they are not yet ready to shave or to otherwise remove the hair growth which has accumulated about their faces. In each instance, their parents were of the view that they did not need to shave. Neither the students nor the parents opposed the practice of shaving once the students have reached the point where they need to shave. The school officials say that point has been reached. The students and parents say it has not. The good grooming rule, as to hair style and shaving, had been applied to several other students, Negro and white, who promptly complied and remained in school.[1]

This court and the district courts of this circuit have become increasingly involved in the administration of the education process. Problems concerning the length of hair, and now whether male students should shave, have become federal cases. *Ferrell v. Dallas Independent School District*, 5 Cir., 1968, 392 F.2d 697; *Davis v. Firment*, 5 Cir., 1969, 408 F.2d 1085; *Griffin v. Tatum*,

[1]The three students here have not been in school since October 20, 1969, preferring instead to stand on their rights. The complaint was filed on November 3 and, after full hearing, the district court denied relief on November 17. Notice of appeal was filed on December 8. An injunction pending appeal was denied, and the case was heard by this court on January 21, 1970.

5 Cir., 1970, F.2d [No. 28,082, slip opinion dated April 20, 1970]; *Zachry v. Brown*, N.D. Ala., 1969, 299 F.Supp. 1360. Cf. such cases as have involved the right to protest the Vietnam conflict. *Tinker v. Des Moines Community School District*, 1969, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, or the right to wear freedom buttons in school, *Burnside v. Byars*, 5 Cir., 1966, 363 F.2d 744; *Blackwell v. Issaquena County Board of Education*, 5 Cir., 1966, 363 F.2d 749.

We have not to date required finality on the part of complaining students in the sense of making certain that expulsion is final from the institutional viewpoint prior to seeking federal court relief. We mean by finality that the expulsion decision is not ripe for adjudication absent the denial of relief to the student by the school board or the designee of the school board for such purposes. Indeed, in *Dixon v. Alabama State Board of Education*, 5 Cir., 1961, 294 F.2d 150, we held that due process required such an institutional remedy as a prerequisite to suspending students. Counsel for plaintiffs sought a hearing before the school board but was unable to be present on the date offered him. Suit was then filed in the federal court and no hearing before the school board was required by the district court although defendants contended that the court should not act until the school board had considered the matter.

The district court, as indicated by a statement made from the bench, seemed to be of the opinion that students in the category of these are not required to exhaust administrative remedies. It is true that in *Dami-*

co *v. California*, 1967, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647, a welfare case, the Supreme Court described a 42 USCA, § 1983 remedy as being supplementary to state remedies. This holding was first made in *Monroe v. Pape*, 1961, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed. 2d 492. See also *Houghton v. Shafer*, 1968, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319; *King v. Smith*, 1968, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118; Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 Colum. L. Rev. 1201 (1968).

We do not take these cases to hold, however, that federal courts are to intervene in school personnel and management problems without requiring such prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institution in the sense that it is ripe for adjudication. On finality, cf. *Scoggin v. Lincoln University*, W.D. Mo., 1968, 291 F.Supp. 161, 173 (dictum in student suspension case).[3] Cf. also *Whitner v. Davis*,

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[3]Although not discussed, *Monroe v. Pape* and *Damico*, both supra, apparently raise the § 1983 remedy to a higher status than federal habeas corpus where exhaustion of state remedies is required. The Supreme Court long ago fashioned an exhaustion of state remedy doctrine for use in federal habeas corpus cases brought by state prisoners. *Ex parte Royall*, 1886, 117 U.S. 241, 251, 6 S.Ct. 734, 29 L.Ed. 868. The doctrine was founded on the necessity for comity as between federal and state courts. It was reaffirmed in *Fay v. Noia*, 1963, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837. See R. Sokol, *A Handbook of Federal Habeas Corpus*, 110-26 (1965); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Har. L. Rev. 1315, 1325-27 (1961).

Because of our ruling on finality or ripeness, we need not decide whether principles of comity should permit school boards to pass on administrative problems prior to a complainant seeking the federal court remedy.

9 Cir., 1969, 410 F.2d 24, 28; *American Commuters Assoc. v. Levitt*, 2 Cir., 1969, 405 F.2d 1148, 1150-51.

The district court should have required that the complaints of these three students be first referred to the board of education. They were, in fact, processed through the school superintendent level. However, at the hearing in the district court, members of the school board testified, and it is clear from their testimony that they would have sustained the suspension of these students. It, therefore, will not be necessary, under these circumstances, for the matter to be referred back to the school board, and we will proceed to consider the case on the merits.

We repeat what the court said in *Griffin v. Tatum*, supra:

> "This court held in *Ferrell v. Dallas Independent School District*, 5 Cir., 1968, 392 F.2d 697, that it was proper for school authorities to establish rules and regulations in the interest of school management and this included a hairstyle regulation. We have not denied school authorities in this circuit the right to promulgate reasonable regulations concerning hairstyles. Such regulations and regulations which deal generally with dress and the like are a part of the disciplinary process which is necessary in maintaining a balance as between the rights of individual students and the rights of the whole in the functioning of schools. The touchstone for sustaining such regulations is the

> demonstration that they are necessary to alleviate interference with the educational process. *Ferrell v. Dallas Independent School System,* supra, at p. 703. That such regulations may be necessary and, if so; that they may be promulgated and enforced, is also clear from the tenor of *Tinker v. Des Moines Community School District*, 1969, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731."

The evidence here supported the finding that shaving is a part of good grooming, in the opinion of the faculty, and that a failure to shave is a departure from the norm which has a diverting influence on the student body. The evidence also demonstrated that the three students had a general growth of hair about their faces to the extent that it was not unreasonable for the school officials to say that the time had come for them to shave. There was no evidence of racial discrimination nor any denial of equal protection as amongst the male students. There is no claim that the students did not know of the rule or that they did not understand it. These findings and conclusions of fact establish that the rule in question is founded on a rational basis, and that it was not arbitrarily applied. It follows that no substantial federal constitutional question was presented. There the matter ends.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Room 408 — 400 Royal St.
New Orleans, La. 70130
(504) 527-6514

June 23, 1970

TO ALL PARTIES LISTED BELOW

Re: No. 28875 — Stevenson, et al v.
Board of Education of
Wheeler County, Ga., et al

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

(Signed) FRANCES WOLFF
Deputy Clerk

cc: Messrs. C. B. King
Elliot Holden
Mr. Thomas M. Jackson
Mr. Wilbur D. Owens, Jr.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
DUBLIN DIVISION

GEORGE STEVENSON, et al.,
Plaintiffs,
CIVIL ACTION.
versus
No. 731

WHEELER COUNTY
BOARD OF EDUCATION, et al.,
Defendants.

ORDER

Filed: Nov. 17, 1969

On September 15th I handed down an opinion in six cases brought by the United States against School Boards in the Southern District of Georgia seeking injunctions against the continued failure on their part to comply with commitments made to the Department of Health, Education and Welfare as to desegregation

plans to be put into effect at the beginning of the present school year.

Up to that time freedom of choice existed in Wheeler County. During the school year 1968-69 Wheeler County High School, embracing all grades through the 12th, had an enrollment of 556 white and 63 black students. Wheeler County Training School, covering the same grades, had 477 colored and no white pupils, Despite the commitment to the Department of Health, Education and Welfare, the Board kept the choice plan in effect at the commencement of the current school year. Three hundred and twenty-nine black and no white students enrolled at Wheeler County Training School and 532 white and 198 black students enrolled at Wheeler County High School.

The desegregation plan agreed on provided that all students in grades 9 through 12 (the high school level) would attend Wheeler County High School. As a result of the court order mentioned, complete desegregation of the public school system has been achieved. At the present time the racial proportion of students in high school is 50-50 and the faculty consists of 15 white teachers and 8 colored teachers. The transition from freedom of choice to a fully integrated system has been accompanied by the problems inevitably connected with the adjustment to integration in a rural Georgia school system. By and large, the new order of things has been accepted. The School Board, Superintendent, principals, faculty and students have tried to make the unitary system work. In the main, the elimination

of the dual system has been accomplished orderly and successfully.

All this is suddenly jeopardized by a lilliput of a lawsuit — a legal controversy that has upset everybody in the school system — a *cause celebre* that attracted a courtroom full of spectators when the matter was heard before me on November 12th. How has this new school crisis come about? What does it involve? It concerns the monumental question of the constitutional right of a student to wear a mustache in violation of a regulation of the school authorities.

I have previously expressed my disrelish of the job thrust upon me of saying how public schools should be run. I not only do not have the time but the task is far beyond my competence. *Acree v. County Board of Richmond County*, 301 F. Supp. 1285, at 1288. Once again, I am cast in the role of a school administrator. With all my overload of work, I must decide the precise point at which the fuzz or down above the lips of a teenager becomes a mustache.

The issue, however, is not so miniscule as I have made it out to be. The head-on collision between student license and faculty authority possesses serious implications for the successful operation of the Wheeler County schools.

In preparation for the approaching term the Board of Education adopted on August 5, 1969, certain "Policies Governing Students." These included:

"Good personal grooming as well as behavior lends much to a good learning environment. All students will be expected to meet the standards of good grooming as set by the faculty and administration and interpreted by the principal or assistant principal of the school. These shall include items such as hair cuts, shorts, culiots, length of dresses, shirt tails, etc. These standards in detail will be presented to each student as a supplement to this handbook and will be discussed at length by your homeroom teacher."

At a pre-school planning session the policies were discussed by the members of the faculty. They were implemented in certain respects by spelling out "Neat Haircut," proper length of dresses, etc. At some point, it is not exactly clear when, the faculty adopted a "clean-shaven" rule for male students. None of these faculty regulations were printed or posted; they are still only in the form of notes.[1] However, they were announced to all the students at a school assembly. This included the "clean-shaven" regulation. The policies were also announced by the teachers to the students in the various classrooms.

The "good grooming" policies have been uniformly enforced and there has been no racial discrimination. Four white students have been warned by teachers

[1]The desirability of *written* rules is mentioned in *Zanders v. Louisiana State Board of Education*, 281 F.Supp. 747. Although I find that the "clean-shaven" rule was not in writing, plaintiffs were aware of its existence.

to cut their hair or shave, otherwise not to come back to school. In each case they complied. Nine colored youths have been similarly warned. All of them complied. Three others (the plaintiffs) refused to do so. They were respectively suspended on October 17th, 20th and 23rd. They are still out of school.

Each of the plaintiffs belongs to the Negro race. George Stevenson who is 16 testified that he objected to shaving until he is old enough. He says that he is not yet ready to put a razor to his face and stated that he, not the School Board, is the one to decide when he should do so. Like the other two plaintiffs, he testified that he has never shaved. Stevenson has a small but perceptible mustache. His mother testified that he would shave when he gets old enough and knows of no law requiring him to do so. Larry D. Harvey who is 15 years old but is large for his age, proposes to grow a mustache. In fact, he has. He also has a fair growth of fuzz on his chin and his jaws. Avery W. Harvey, Jr. who is 17 objects to shaving and desires to grow a mustache. He already has.

The complaint charges that the expulsion of the plaintiffs has deprived them of rights protected by the Fourteenth Amendment. While petitioners do not allege a First Amendment right to wear a mustache and to attend school unshaven they assert that the constitutionally protected right to express one's individuality is involved. Ethnic factors are also claimed. The suit alleges that as a result of slavery the ancestors of petitioners were dehumanized and their manhood emasculated. They claim that the wearing of mustaches

and facial hair growths are symbols for them and other black youths of their masculinity.

There were no racial overtones in the adoption of the "clean-shaven" policy. Among the witnesses for the Board was a colored high school teacher who strongly stressed the importance of good grooming in the educational process. She testified that shaving comes under it. All members of the faculty approved the rule that young men should be clean-shaven. School officials testified that any unusual diversion from the norm has a diverting influence on the student body. The basis of the rule in controversy is that mustaches and facial hair growth are distractive.[2]

In *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (cert. denied 393 U.S. 856) the Fifth Circuit Court of Appeals was faced with a case in which several students had been expelled for wearing Beatle-type haircuts. The Court initiated its discussion by attempting to determine the basis or authority for the right claimed to be infringed by the School Board in derogation of the Fourteenth Amendment. It assumed, for purpose of argument, that its origin is to be found in the First Amendment. "We shall assume, though

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[2]In *Davis v. Firment*, 269 F. Supp. 524, at 528, the School Superintendent thus articulated the school's side of the controversy: "Throughout the realm of professional education there is a distinct and direct relationship between student dress and conduct... From my experience, I know that gross deviation from the norm does cause a disruption of the learning atmosphere and can create an undesirable separateness among students. Furthermore, gross deviation can be and has been dysfunctional in the social adjustment of children."

we do not decide for the purpose of this opinion that a hair style is a constitutionally protected mode of expression." Proceeding on this premise, the Court adopted the arbitrary-capricious-unreasonable principle applied in earlier First Amendment cases. The majority opinion stated:

> "The decided cases clearly demonstrate that each case must be decided in its own particular setting and factual background and within the context of the entire record before the court in determining whether the rule or the action about which complaint is made is arbitrary, capricious, unreasonable or discriminatory. This approach to the problem is clearly demonstrated by the authorities hereinafter cited as well as the following: *Thornhill v. State of Alabama*, 310 U.S. 88, 101, 60 S.Ct. 736, 84 L.Ed. 1093, 1102; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 627, 63 S.Ct. 1178, 87 L.Ed. 1628, 1637; *Dennis v. United States*, 341 U.S. 494, 510, 71 S.Ct. 857, 868, 95 L.Ed. 1137, 1153; *Whitney v. People of the State of California*, 274 U.S. 357, 376, 47 S.Ct. 641, 71 L.Ed. 1095, 1106. In *Dennis v. United States*, *supra*, the Supreme Court approved, as a general rule, the following statement by Chief Judge Learned Hand: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"

The Court went on to hold in *Ferrell* that the actual and potential interference with the school curriculum created by the particular factual situation justified the sanctions imposed under the school board's regulation of length of hair of students. This *ad hoc* procedural approach adopted by the Court in that case is apparently no longer required in the light of the recent ruling of the Supreme Court in *Tinker v. Des Moines Independent Community School District*, ____ U.S. ____. In that case the highest Court indicated that hair style may be distinguished from other forms of expression and that it is not a direct, primary First Amendment right. The Court said:

> "The problem presented by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. Compare *Ferrell v. Dallas Independent School District*, 392 F.2d (1968); *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923). It does not concern aggressive disruptive action or even group demonstration. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"

The decision in *Ferrell* has been followed recently in the Fifth Circuit in *Davis v. Firment*, 408 F.2d 1085. Since there was little discussion at the appellate level, consideration of the ruling of the District Judge in that case will be useful. (See 269 F. Supp. 525). The case involved a school regulation to the effect that hair should be neat and that long or shaggy hair or

exaggerated sideburns are prohibited. Judge Commiskey wrote:

> "The predominant interest of a school is to educate its students. If a particular type of conduct has the effect of disrupting the learning atmosphere it should be subject to regulation.... Just what does the wearing of long hair symbolize? What is student Davis trying to express? Nothing really. Even if the wearing of long hair is assumed to be symbolic expression, it falls within that type of expression which is manifested through conduct and is therefore subject to reasonable state regulation in furtherance of a legitimate state interest."

It will also be of interest to consider the opinion of the District Judge in the *Ferrell* case. In *Ferrell v. Dallas Independent School District*, 261 F. Supp. 545 Judge Taylor said:

> "Since confusion and anarchy have no place in the classroom, school authorities must control the behavior of their students. If the student's dress is lewd or his appearance is a studied effort to draw attention to himself, his presence is disruptive — such behavior is no different than verbal rudeness."

I am aware that there are District Court decisions contrary to what is held here, including *Griffin v. Tatum*, 300 F. Supp. 60 and *Breen v. Kahl*, 296 F. Supp.

702. Both these decisions would place an intolerable burden on Federal courts to examine each new case minutely on its facts in order to determine whether, in a particular instance, the mode of dress or hair style is actually disruptive to the successful operation of the school. In *Breen* the District Judge justified such attention to detail by treating the right to wear long hair as if it were protected by the First Amendment. That theory was expressly rejected in *Tinker, supra*. In *Griffin* the Court considered the facts in considerable detail in an attempt to determine whether or not the hair style was sufficiently disrupting to justify the regulation under attack. It miniates excellently the absurd extremes to which judges who would accept the role of judging tonsorial arrangements must go.

Among the things a student is supposed to learn at school (at least, such is my idea) is a sense of discipline. Of course, rules cannot be made by authorities for the sake of making them but they should possess considerable leeway in promulgating regulations for the proper conduct of students. Courts should uphold them where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools. By accepting an education at public expense pupils at the elementary or high school level subject themselves to considerable discretion on the part of school authorities as to the manner in which they deport themselves. Those who run public schools should be the judges in such matters, not the courts. The quicker judges get out of the business of running schools the better. I have no intention of becoming a tonsorial

or sartorial consultant of boards, superintendents and principals. Except in extreme cases the judgment of school officials should be final in applying a regulation to an individual case.

Counsel for plaintiffs makes much of the fact that the existence of facial hair growth of a student has never created any incidents or commotion in the Wheeler school system and that the regulation requiring shaving is therefore without basis in reason and is arbitrary. The mere fact that a particular hair style or hirsute growth on one's face has not created a classroom disturbance is not conclusive of its unreasonableness. Students wearing mustaches or beards in a high school may be a distracting influence on a student body which does not wear them. Teachers have a right to teach in an atmosphere conducive to teaching and learning and unkempt faces do not contribute much to it. I find the regulation under attack reasonable and not arbitrary. It was adopted in good faith and is not racially oriented.

It is unfortunate that these three young men are not back in school but even more regrettable that they are voluntarily depriving themselves of an education. It is their doing, not mine. All they have to do to get back in school is to shave their upper lips. At the hearing I even suggested that if they did not want to use a razor they could use clippers. This was unsatisfactory to the petitioners who apparently place their right to go to school with hair above their lips and on their faces above getting an education.

The prayer for injunctive relief is denied.

This 17th day of November, 1969.

(Signed) ALEXANDER A. LAWRENCE
CHIEF JUDGE, UNITED
STATES DISTRICT COURT
SOUTHERN DISTRICT OF
GEORGIA

Supreme Court, U.S.
FILED
NOV 6 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 725

GEORGE STEVENSON, a minor by his next friend, Mrs. Mattie Stevenson; LARRY D. HARVEY, a minor, by his next friend, J. W. Harvey, Jr.; AVERY W. HARVEY, JR., by his next friend, A. W. Harvey on behalf of themselves and all others similarly situated,

Petitioners,

versus

THE BOARD OF EDUCATION OF WHEELER COUNTY, GEORGIA, and ASHLEY CLARKE, W. J. MITCHELL, L. B. CHAMBERS, A. B. CLARK, CLADY COX, V. L. NEWTON individually and in their official capacities as members of the Board of Education of Wheeler County, Georgia; WILLIAM S. CLARK, individually and in his official capacity as Superintendent of Schools of Wheeler County; PERRY DOAK, individually and in his official capacity as Principal of Wheeler County High School,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

For the reasons herein stated the cause of these Petitioners should not be reviewed by this Court.

QUESTIONS PRESENTED

Contrary to the contentions of Petitioners this cause presents only the questions (a) of whether or not the District Court in its findings of fact and conclusions of law erred in concluding that Respondent school board in good faith adopted and fairly enforced reasonable regulations requiring good grooming of its students and (b) of whether or not the United States Court of Appeals for the Fifth Circuit erred in affirming the judgment of the District Court.

STATEMENT OF THE CASE

A. *Petitioner Avery Harvey Has Complied With the Challenged Regulation and Returned to School.*

On September 30, 1970, Petitioner Avery Harvey complied with the regulations herein challenged and was readmitted to the Wheeler County High School. Appendix A. As to that Petitioner the issues urged are moot.

B. *The Case Below.*

The facts as found by the District Court and set forth in the opinion below, 306 F. Supp. 97 are:

> "In preparation for the approaching term the Board of Education adopted on August 5, 1969,

certain 'Policies Governing Students.' These included:

> 'Good personal grooming as well as behavior lends much to a good learning environment. All students will be expected to meet the standards of good grooming as set by the faculty and administration and interpreted by the principal or assistant principal of the school. These shall include items such as hair cuts, shorts, cullots, length of dresses, shirt tails, etc. These standards in detail will be presented to each student as a supplement to this handbook and will be discussed at length by your homeroom teacher.'

"At a pre-school planning session the policies were discussed by the members of the faculty. They were implemented in certain respects by spelling out 'Neat Haircuts,' proper length of dresses, etc. At some point, it is not exactly clear when, the faculty adopted a 'clean-shaven' rule for male students. None of these faculty regulations were printed or posted; they are still only in the form of notes. However, they were announced to all the students at a school assembly. This included the 'clean-shaven' regulation. The policies were also announced by the teachers to the students in the various classrooms.

"The 'good grooming' policies have been uniformly enforced and there has been no racial discrimination. Four white students have been warned by teachers to cut their hair or shave, otherwise not to come back to school. In each case they complied. Nine colored youths have been similarly warned. All of them complied. Three others (the plaintiffs) refused to do so. They were respectively suspended on October 17th, 20th and 23rd. They are still out of school.

"Each of the plaintiffs belongs to the Negro race. George Stevenson who is 16 testified that he objected to shaving until he is old enough. He says that he is not ready to put a razor to his face and stated that he, not the School Board, is the one to decide when he should do so. Like the other two plaintiffs, he testified that he has never shaved. Stevenson has a small but perceptible mustache. His mother testified that he would shave when he gets old enough and knows of no law requiring him to do so. Larry D. Harvey who is 15 years old but is large for his age proposes to grow a mustache. In fact, he has. He also has a fair growth of fuzz on his chin and his jaws. Avery W. Harvey, Jr., who is 17 objects to shaving and desires to grow a mustache. He already has.

"The complaint charges that the expulsion of the plaintiffs has deprived them of rights

protected by the Fourteenth Amendment. While petitioners do not allege a First Amendment right to wear a mustache and to attend school unshaven, they assert that the constitutionally protected right to express one's individuality is involved. Ethnic factors are also claimed. The suit alleges that as a result of slavery the ancestors of petitioners were dehumanized and their manhood emasculated. They claim that the wearing of mustaches and facial hair growths are symbols for them and other black youths of their masculinity.

"There were no racial overtones in the adoption of the 'clean-shaven' policy. Among the witnesses for the Board was a colored high school teacher who strongly stressed the importance of good grooming in the educational process. She testified that shaving comes under it. All members of the faculty approved the rule that young men should be clean-shaven. School officials testified that any unusual diversion from the norm has a diverting influence on the student body. The basis of the rule in controversy is that mustaches and facial hair growth are distractive." pp. 98 & 99.

Since Petitioners do not contend that the District Court's findings of fact are not supported by the evidence or are clearly erroneous, the evidence is not herein summarized. Respondents, however, do call the Court's attention to the fact that Petitioners' original complaint, paragraphs V, IX and X, and their petition

for a writ of certiorari, particularly page 6, contend that Petitioners' refusal to shave and thereby comply with Respondents' good grooming regulations was and is founded upon their desire to grow a beard and thereby symbolically express their Negro manhood. Petitioners in testifying before the District Court, did not say anything other than that they and not the school board or faculty, should decide when they are to begin to shave and when a shave is needed. (Transcript pp. 84, 91, 95, 106, 109, 113, 116, 118-125). One Petitioner stated I "ought to be able to decide when to shave instead of the school board deciding..." (Tr. p. 109) Neither of minor Petitioners nor their parents objected to the policy or regulation of Respondents that requires a clean shave. None of Petitioners even mentioned racial discrimination or objected to the principle of shaving.

Petitioner George Stevenson's mother testified that she objected to George shaving and said that when George gets old enough, he will shave. (Tr. p. 95) On cross-examination she admitted that George's brother was also sent home from school to shave and that he shaved and returned to school. (Tr. p. 98)

Petitioner A. W. Harvey stated that in his opinion his son does not need to shave at this point and that "if he needed shaving, he would have shaved before he went to school." (Tr. p. 84)

Larry D. Harvey's father said "he don't have anything to shave . . .; it's too early for Larry to shave. (Tr. p. 113, 116)

The trial court found "the regulation under attack reasonable and not arbitrary. It was adopted in good faith and is not racially oriented.

"It is unfortunate that these three young men are not back in school but even more regrettable that they are voluntarily depriving themselves of an education. It is their doing, not mine. All they have to do to get back in school is to shave their upper lips. At the hearing I even suggested that if they did not want to use a razor they could use clippers. This was unsatisfactory to the petitioners who apparently place their right to go to shcool with hair above their lips and on their faces above getting an education. 306 F. Supp. 101. Because of this Petitioners' prayers for injunctive relief were denied.

On appeal the trial court's denial of Petitioners' prayers for injunction was affirmed. This court's attention is directed to the following portions of the opinion of the Court of Appeals for the Fifth Circuit:

> "At the outset, it is important to state that this case does not involve the right to wear a mustache; it is limited by its facts to three young men who, having entered puberty, have determined that they are not yet ready to shave or to otherwise remove the hair growth which has accumulated about their faces. In each instance, their parents were of the view that they did not need to shave. Neither the students nor the parents opposed the practice of shaving once the students have reached the

point where they need to shave. The school officials say that point has been reached. The students and parents say it has not. The good grooming rule, as to hair style and shaving, had been applied to several other students, Negro and white, who promptly complied and remained in school."

* * * *

"We repeat what the court said in Griffin v. Tatum, supra:

'This court held in Ferrell v. Dallas Independent School District, 5 Cir., 1968, 392 F.2d 697, that it was proper for school authorities to establish rules and regulations in the interest of school management and this included a hairstyle regulation. We have not denied school authorities in this circuit the right to promulgate reasonable regulations concerning hairstyles.' "

* * * *

" 'That such regulations may be necessary and, if so, that they may be promulgated and enforced, is also clear from the tenor of Tinker v. Des Moines Community School District, 1969, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731.'

"The evidence here supported the finding that shaving is a part of good grooming, in the opinion of the faculty, and that a failure to shave is a departure from the norm which has a diverting influence on the student body. The evidence also demonstrated that the three students had a general growth of hair about their faces to the extent that it was not unreasonable for the school officials to say that the time had come for them to shave. There was no evidence of racial discrimination nor any denial of equal protection as amongst the male students. There is no claim that the students did not know of the rule or that they did not understand it. These findings and conclusions of fact establish that the rule in question is founded on a rational basis, and that it was not arbitrarily applied. *It follows that no substantial federal constitutional question was presented.* There the matter ends." 426 F.2d 1156-8. Emphasis added.

ARGUMENT

A. *This Case Is Like Jackson v. Dorrier, No. 355, Certiorari Denied October 12, 1970.*

Jackson v. Dorrier, No. 355, cert. denied October 12, 1970, 39 U.S.L. Week 3149, ____ U.S. ____, as demonstrated by the following portions of the opinion below, 424 F.2d 213 (6th Cir. 1970), is similar and in reality on all fours with this cause:

"The Metropolitan Board of Education of Nashville and Davidson, County, Tennessee, adopted the following regulation in 1961:

> 'Pupils shall observe modesty, appropriateness, and neatness in clothing and personal appearance. A student is not appropriately dressed if he is a disturbing influence in class or school because of his mode of dress. The principal may suspend a student who does not meet this requirement.'

"Under this regulation the students at Donelson High School were told, as to hair on male students, that hair in the front may not come below the eyebrows, ears must show clear of hair, and hair in the back is to be tapered and not be long enough to turn up.

"Two male students, Michael Jackson and Barry Steven Barnes, who were members of a combo band known as 'The Purple Haze,' permitted their hair to grow longer than prescribed by school officials. After conferences with the students and their parents the students were suspended by the principal and sent home for violation of the regulation. After additional conferences a hearing was conducted before the Board of Education. The Board sustained the action of the principal." pp. 214, 215

* * * *

"District Judge Frank Gray, Jr., conducted an extensive hearing and denied injunctive relief. He made an affirmative finding of fact to the effect that the evidence unquestionably establishes that the regulation has a real and reasonable connection with the successful operation of the educational system, in that it is reasonably calculated to maintain school discipline. He held that the evidence failed to show that the students have been deprived of any constitutional rights.

"We affirm." p. 215

* * * *

"The District Court made a finding of fact to the effect that the regulation here attacked, as interpreted and enforced by the principal of Donelson High School, has a real and reasonable connection with the successful operation of the educational system and tends to help maintain school discipline. He further found that the evidence failed to show that the students have been deprived of any constitutional rights." p. 216

* * * *

"It is contended that enforcement of the regulation deprived the two students of freedom of speech and expression in violation of the First Amendment. Neither of the students tes-

tified that his hair style was intended as an expression of any idea or point of view." p. 217

* * * *

"As previously stated, substantial evidence supports the finding of the District Judge that the regulation has a real and reasonable connection with the successful operation of the educational system and with the maintenance of school discipline." p. 218

* * * *

"In the absence of infringement of constitutional rights, the responsibility for maintaining proper standards of decorum and discipline and a wholesome academic environment at Donelson High School is not vested in the federal courts, but in the principal and faculty of the school and the Metropolitan Board of Education of Nashville and Davidson County, Tennessee." pp. 218, 219

For the same reasons that certiorari was denied in *Jackson v. Dorrier*, it should be denied in this cause.

B. *This Decision Does Not Conflict With The Decision of Another Court of Appeals*

Petitioners while they "acknowledge no case exactly on point with this one", assert that this decision conflicts with *Breen v. Kahl*, 419 F2d 1034 (7th Cir. 1969),

cert. denied, ____ U.S. ____ 38 U.S.L. Week 3478: pages 8 & 9 of Petition.

The District Court in *Breen v. Kahl*, 296 F.Supp. 702, in considering whether or not "wearing one's hair at a certain length or wearing a beard is a form of constitutionally protected expression..." stated that "In the view I take of this matter, however, *it is unnecessary to reach a conclusion* whether wearing one's hair at a certain length or wearing a beard falls within that category of 'expression' protected by the First Amendment." p. 705, emphasis added. The District Court went on to determine instead "whether the defendants have met the 'substantial burden of justification' of this regulation which invades a freedom deserving a high degree of protection ..." p. 708. The court found:

> "In many situations, no doubt, whether 'a substantial burden of justification' of a regulation has been met is a delicate and uncertain matter. This is not such a situation. Defendants here have fallen far short of showing that the distraction caused by male high school students whose hair exceeds the Board standard is so aggravated, so frequent, so general, and so persistent that this invasion of their individual freedom by the state is warranted. The same is true of defendants' showing with respect to the differential in school performance between male students with long hair and those with short hair." p. 709.

In effect the court determined that the Defendants failed to carry the burden of proof that was upon them.

The Seventh Circuit Court of Appeals affirmed and in so doing distinguished *Breen* from *Ferrell v. Dallas Independent School District*, the Court of Appeals decision which Petitioners contend *Breen* conflicts with, to wit:

> "The failure of appellants to sustain any burden of substantial justification distinguishes the case at bar from the situation in Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), cert. denied, 393 U.S. 856, 89 S.Ct. 98, 21 L.Ed.2d 125 (1968), upon which the appellant School Board heavily relies. In *Ferrell*, the court in upholding the constitutionality of the school regulation found that wearing of long hair by students created disturbances and problems during school hours. Although we are more inclined to agree with Judge Tuttle's dissenting opinion in *Ferrell* that 'court's [are] too prone to permit a curtailment of a constitutional right of a dissenter, because of the likelihood that it will bring disorder[s], resistance or improper and even violent action by those supporting the status quo,' in the case at bar there is no evidence of any disturbance created by the long hair of the students. Consequently, we are not faced with the problem of evaluating whether regardless of some disorder constitutional rights must still be protected, see Terminiello v. City of

Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1948)." p. 1037.

Respondents respectfully submit that the circuit courts have consistently required school boards to carry a substantial burden of justifying rules and regulations like those here under attack and that as such there is agreement — not conflict — as to the basic legal issue involved. *Breen v. Kahl, supra, Ferrell v. Dallas Independent School District, supra, Jackson v. Dorrier, supra,* and this case are examples of this consistency. Since Petitioners do not contend that any other particular circuit court decision conflicts, Respondents have not included a summary or discussion of the other cases that could also be mentioned but if the Court desires, will be pleased to summarize or discuss any other cases.

There is no conflict among the courts of appeal, and for this additional reason certiorari should be denied.

C. *There Are No Other Grounds Or Reasons For The Granting Of This Petition*

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor . . ." Rule 19.

Respondents have already demonstrated that this Court of Appeals decision is in harmony — not conflict — with those of other courts of appeals. Petitioners do not contend that any of the other reasons

enumerated in Rule 19(b) are a reason for this cause to be reviewed. They do contend in effect that Respondents did not carry the burden of justification i.e. "respondents have not shown any reasons for the restrictions placed upon petitioners right ..." page 9 of Petition; "It is beyond us the purpose of such a regulation. Merely arbitrary choices of states or their official representatives cannot be enforced against any individual's serious claims of liberty ..." *id.* p. 13. "The decision below is palpably erroneous." *id.* p. 15.

"...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses ..." Rule 52, Federal Rules of Civil Procedure.

Chief District Judge Lawrence judged of the credibility of the witnesses, heard the evidence and determined that the regulation in question was reasonable, was adopted in good faith and "is not racially oriented." 306 F. Supp. 101. There is more than sufficient evidence to support these findings of the District Court, and as such there is no merit in the "palpably erroneous" argument urged by Petitioners.

CONCLUSION

There are no special or important reasons for the granting of review on writ of certiorari of this cause. As a matter of sound judicial discretion review of this case should be denied.

Respectfully submitted,

Wilbur D. Owens, Jr.
Attorney for Respondents
P.O. Box 4348
Macon, Georgia 31208

Of Counsel:
Bloch, Hall, Hawkins & Owens
P.O. Box 4348
Macon, Georgia 31208

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the within response was this date mailed to Messrs. C. B. King & Elliott Holden, to Thomas M. Jackson and to Howard Moore, Jr. by depositing the same in a United States post office or mail box with first class prepaid postage thereon in an envelope addressed to each of them at their respective post office addresses.

This _____ day of November, 1970.

Wilbur D. Owens, Jr.

APPENDIX A

WHEELER COUNTY BOARD OF EDUCATION
Wm. S. Clark, Superintendent
Carline B. Cox, Clerk
Alamo Georgia
30411
Office Phone 568-3041
Resident Phone-568-2451

September 30, 1970

Wilbur D. Owens, Jr.
Attorney
Bloch, Hall, Hawkins and Owens
Suite 1401, Georgia Power Building
577 Mulberry Street
P.O. Box 4349
Macon, Georgia 31208

Dear Mr. Owens:

This is to notify you that Avery Harvey, one of the Plaintiffs in the George Stevenson et al vs. the Wheeler County Board of Education No. 731 in the U.S. District Court, Southern District of Georgia, Dublin Division, has as of this date returned to the Wheeler County High School, fully conformed to all school policies.

Sincerely,

(Signed) WM. S. CLARK
Wm. S. Clark, Supt.
Wheeler Co. Schools

WSC:cc